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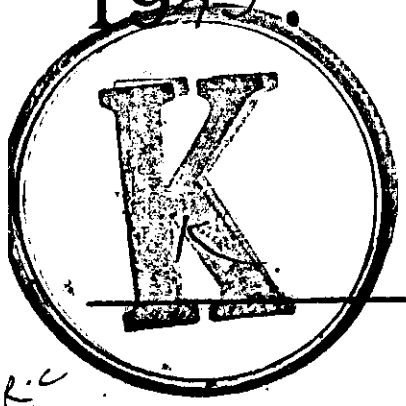

File No. O Boroughs 43

Legal DEPARTMENT
"A" BRANCH

Subject:—

Opinions under the Bombay Municipal Boroughs Act; 1925.

P. 88/12

File No. O Boroughs/43
129-A

Std. Sectt. Slip 24 B e.

Contents.

Legal Department Vol. No. O.Boroughs /1943.

S.No.	Compilation No.	Subject.	Pages.
	O.Boroughs/1943.	Opinions under the Bombay Municipal Boroughs Act,1925.	
1.	O.No.885/5-2-43.	Question whether the Bandra Municipality is legally entitled to be indemnified by Govt.in the event of the consumer taking action against the Municipality for damages as a result of the disconnection of of the water supply under the direction of Government.	1 - 2.
2.	O.No.877/4-2-43.	Re: Inclusion of the Kurla Municipality in Schedule I to the Bombay Municipal Boroughs Act, 1925. Question- Whether the remissions granted by the Municipality under the rule 180 of the Bombay District Municipal Act, 1901. in the case of the general sanitary cess are lawful.	3 - 6.
3.	O.No.1748/10-3-42.	Re: Charging of fee of Rs. 80/- to the Kurla Municipality for supply of R.L.A.'s opinion No.877 dated 4-2-1943.	7- 10..
4.	O.NO.2446/2-4-43.	Question whether it would be competent for Govt.to levy non-agricultural assessment in respect of land vesting in the Municipality and used for market.	11-12.
5.	O.No.161 Confl./ 8-4-43.	Re: Appointment of an Administrator to the Ahmedabad Municipality. Question is whether the dismissal order passed by the Administrator in respect of a Municipal employee after his appointment as Administrator would be legal and valid.	13- 14.
6.	O.No.111-Confl./ 3-3-43.	Ahmedabad Municipal Rules. Question regarding sanction of revised scale of max pay of the post of Chief Officer.	15-16.
7.	O.No.2018/18-3-43.	Question whether the Ahmedabad Municipality is competent to revise the scale of pay of the post of chief officer so as to reduce the pay of the holder thereof.	17-18.
8.	O.No.998/9-3-43.	Question whether the appointment of Mr. Bhagat by the Ahmedabad Municipality as Municipal Adviser under Sec.71(r) of the Municipal Boroughs Act,1925 can be justified.	19-22.
9.	O.No.3080/27-4-43.	Question 1)whether the expenditure incurred by the Municipality on gutters on private lands is legal; if not 2) whether the same can be recovered from the plot owners.	23 -24.

B.L.C 23/5

10.	R.I.No. 5727/ 11-5-43.	C.L., G.D.No.5277/5932-A dated 6-5-43. addressed to the Comm.C.D. and copy to L.D. with reference to R.L.A. 'sNo. 3020 dated 27-4-1943.	25 -26.
11.	O.No.3579/15-5-43.	Re: Filling up of a vacancy of a Municipal Councillor on account of a death of one of the elected councillors who died ~~xxxx~~ before any meeting of the newly elected councillors could be held. Questions 1) Whether a bye-election can be held under sec.28 of the Bombay Municipal Boroughs Act,1925 for filling up the vacancy, or 2)Whether another candidate who obtained the next largest number of votes can be declared to be elected.	27- 30.
12.	O.No.4136/10-6-43.	Re: Offer of an advance to the Municipality by the public spirited citizens without interest or the purpose of importing more food supplies to meet the inadequacy. Questions. 1) Whether the transaction amounts to a borrowing by the Municipality; 2) Whether in view of Sec.7 of the Local Authorities Loans Act, 1914, The Municipality has an authority to borrow under the Bombay Municipal Boroughs Act; and 3) Whether the Municipality is competent to borrow money for the purposes stated above.	31-34.
13.	O.No.4418/24-6-43.	Re: Giving of sufficient time by the Municipalities to the receivers of special notices in order to enable them to lodge objections before the date fixed in public notice.	35 -36.
14.	4784/5-7-1943.	Questions 1)Whether the levy of notice and warrant fee in case of default of payment of the Urban Immovable Property tax after presentation of the bill for demand of the tax if legal under Sec.105(1) of the Bombay Municipal Boroughs Act, 1925, read with Sec.24(2) of the Bombay Finance Act,1932; 2) If so, whether such fees should be credited to Government ~~~~ to the Municipality.	37- 38
15.	R.I.No.7318/13-7-43.	Re: Opinion of the Advocate General Bombay No.15 dated 13-7-1943 in respect of the matter mentioned at S.No.14 above.	39-44.
16.	O.No.5039/23-7-43.	Re: Forwarding the Advocate General's opinion mentioned at S.No.15 to the Revenue Department.	45-46
17.	O.No.61-B-Confl./ 9-8-43.	Question whether an elected councillor of the Municipality can be held to have incurred disqualification by reason of his enforced absence on account of detention under the Defence of India Rules. 26 . Question also whether Collector's order declaring his seat vacant can be set aside by Govt.under sec.28(2) of the Bombay Municipal Boroughs Act,1925.	47 -

18.	O.No.5492/12-8-43.	Question whether the publication of recision is necessary especially in view of the fact that the particular by-law of the Municipality was ultra-vires.	49 -50.
19.	O.No.5837/28-8-43.	Question whether Canteen Stores as are not consumed within the octroi limits but are exported for sale are exempt from the levy of Octroi under Rule 4(2)(c)of the Octroi Rules of the Municipality.	51-52.
20.	O.No.5983/7-9-43.	Question whether or not an old motor car belonging to a person forms part of his kit and as such is not liable to octroi duty when brought within the limits of a Municipality along with his other kit.	53-54.
21.	O.No.6098/11-9-43.	Re: Refusal of the Municipality to collect the riot tax ordered to be collected, by the District Magistrate, before the Municipality came under the charge of the Administrator. Proposal of the Commissioner to drop the course of taking action against the Municipality under sec.218 of the Bombay Municipal Boroughs Act.1925 and to order the Administrator to make the recovery under sec.25A of the Bombay District Police Act, 1890. Question whether there is any objection to reverting to the procedure of recovery under the Bombay District Police Act, after initiating action under sec.218 of the Bombay Municipal Boroughs Act. 1925.	59- 60.
22.	O.No/6354/21-9-43.	Re: Interpretation of the proviso to Sec.209(2) of the Bombay Municipal Boroughs Act.1925.	
23.	R.I.No.9479/29-9-43.	G.R.R.D.No.1006/39 dated 27-9-43. Re: Bombay Finance Act,1932. Notice and Warrant fees Legality of levy in respect of property tax of .	61-64.
24.	O.No.6355/21-9-43.	Re: Imposition of Wheel and Toll tax by the Municipality on bycycles.	
25.		Note prepared by the office as directed by R.L.A. on the question whether Govt. is a necessary or proper party in a suit filed against a local authority superseded under the Municipal Act,Local Board Act, or the Defence of India Rules.	65-72.

26.	R.I.No.5222/26-9-43. O.No.6942/8-10-43.	Re: Claim by Municipalities in respect of lands. Question whether there is any period of limitation within which the municipalities should prefer their claims.(Please also see L.A.'s No.6941/18-10-43.).	73-76.
27.	R.I.No.5223/2-9-43. O.No.7030/23-10-43.	Re: Framing of building bye-laws and Prevention of Hibidan Development bye-laws by the Municipality under clause(v) of Sec.61(1) of the Bombay Municipal Boroughs Act, 1925. Question whether the bye-laws can more appropriately be framed under clause mentioned rather than under clause(v) of the section.	77-78.
28.	O.No.6703/24-11-43.	Questions 1) Whether the Proviso to sub-section (1) of section 23 of the Bombay Municipal Boroughs Act, 1925, overrides the provisions of Sec.21(2)(a) of the Act; and (2) In case a new election roll is not published in time as required by the the Election Rules, whether the Municipality would be legally competent to hold the general election on the basis of the election roll now in operation.	79-80
29.	O.No.5437/13-8-43. (G.P. to Adv.General)	Re: Claim by Municipalities in respect of lands which were sold by Govt. to third parties thinking that the same are not more required by the municipalities for any ~~the~~ public purpose. Question whether there is any period of limitation within which the municipalities should prefer their claims.	81-86.
30.	R.I.No.5432/27-9-43.	Re: Advocate General's opinion No.25 dated 27-9-43 in respect of the matter mentioned at s.No.29 above.	87-92.
31.	O.No.6941/18-10-43.	Re: As in Serial No. 29.	93-96.
32.	O.No.[illegible]	Re: Levy of special Educational cess of annas four on every bale of cotton full pressed in cotton pressing factories and on every baja of cotton ginned in ginning factories within the municipal limits. Question whether the levy of the special educational cess in the manner proposed above is in the nature of an excise duty under entry 45 of list I in Schedule VII to the Govt. of India Act, 1935 if so, 2) Whether it can be regarded as a tax on trades; if not 3) how the cess can be levied by the Municipality.	97-98.

One Mr. Deokisansing Deonarayan had a water connection for his stables from the Government main on the 7th road in Santa Cruz Town Planning Scheme No.III. This connection was closed last year at the request of the consumer. After enquiry it was found that he has been granted a water connection from the Municipal main in the Santa Cruz limit by the Bandra Municipality. Though the Santa Cruz area comes within the extended limits of the Bandra Municipality, the distribution of water in that area is said to be still under the control and management of Government. The Executive Engineer, Thana Division, therefore requested the Bandra Municipality to disconnect the water connection given to Mr. Deokisansing Deonarayan. The President, Bandra Municipality, then in his letter at pages 2-3 ante stated in reply that it was not correc to say that the water distribution of the area in which the premises of the consumer are situated is exclusively under the control of Government. He pointed out that there is no agreement between Government and the Municipality defining and demarketing the area within which the Municipality and Government should respectively restrict their control of water supply. After further consideration the Executive Engineer again requested the Bandra Municipality to disconnect the connection given to Mr. Deokisansing. Accordingly the Bandra Municipality informed the consumer that his water connection from the Bandra Municipality informed the consumer that his water connection from the Bandra Municipal main would be closed from 1-3-1941. Mr.Deokisansing in his letter at page 19 ante has protested against as he has spent about Rs.2000 on laying out the pipe line and threatened to claim all costs and damages resulting from the disconnection by the Bandra Municipality. The Bandra Municipality was enquired whether the Municipality would be indemnified by Government in case the consumer takes action for damages.

2. The question for R.L.A's consideration is whether the Bandra Municipality is legally entitled to be indemnified by Government in the event of the consumer taking action against the Municipality for damages as a result of the disconnection of the water supply.

3. Under clause (j) of section 68 (1) of the Bombay Municipal Boroughs Act, 1925, it is the duty of a Municipality to make reasonable and adequate provision for obtaining a supply or an additional supply of water, proper and sufficient for preventing danger to health of the inhabitants from the insufficiency or unwholesomeness of the existing supply when such supply or additional supply can be obtained at a reasonable cost. It follows from this provision that it is the duty of a Municipality either to construct and maintain a system of water supply itself or enter into an agreement with any agency for supply; but whether inspite of such supply through an agency a municipality can establish its own system of supply would depend upon the terms of contract with that agency. In the present case it appears that the Santa Cruz area which is supplied with water by Government has been brought within the municipal limits of Bandra; but there is no agreement between the Bandra Municipality and Government in connection with the supply of water. The Superintending Engineer in his letter at page 5 ante however has stated thus:-

"It is true that Santa Cruz area comes within the extended limits of the Bandra Municipality, but the distribution of water in that area is still under the control and management of Government and so long as the Santa Cruz water supply is not transferred to that body, Bandra Municipality cannot and should not grant any such connection in the area managed and controlled by Government." It would appear from that statement that Government has the sole monopoly of supplying water in the Santa Cruz area and it would follow as a necessary corollary that no other authority has a right to supply water in that area. But there is not enough in the papers forwarded to Legal Department to substantiate such an inference. Consequently in the absence of proper materials it is

not possible for the R.W.A. to express any opinion on the view expressed above by the Superintending Engineer. On the assumption that Government has a monopoly of the water supply in the Santa Santa Cruz area, the grant of water connection to Deokisansi ng in the Santa Cruz area by the Bandra Municipality would not be lawful. Whether the Bandra Municipal ity would be liable to pay damages to Deokisansingh would be another matter with which Government is not concerned. There is no valid reason why Government should idemnify the Bandra Municipality in the event of Deokisansingh obtaining a decree against the Municipality for damages. But unless it is established that no authority but Government has a right to supply water in the Santa Cruz area it is not clear that Government should insist on the Municipality disconnecting the supply.

Sd/-P.N.M.
Remembrancer of Legal Affa:

U.R. to P.W.D., No.665, dated the 5th February 1943.

B.K.S. 2/5.

It appears that before the Kurla Municipality was included in Schedule I to the Bombay Municipal Boroughs Act, 1925, it had framed certain Rules and By-laws for the levy of taxes under the Bombay District Municipal Act, 1901, but after it was so entered in that Schedule those Rules and By-laws were continued under the proviso (b) to section 5 of the Bombay Municipal Boroughs Act. Although the Appendice A and B to those Rules and By-laws relating to the "House and Property Tax" and the "Conservancy Cess" were subsequently amended in 1931., the substantive provisions in the Rules and By-laws relating to remissions have remained the same.

2. Clause (i) of section 46 of the Bombay District Municipal Act which corresponds to clause (j) of section 58 of the Bombay Municipal Boroughs Act empowers a municipality to make rules prescribing, subject to the provisions of Chapter VII, the ~~xxxxxx~~ taxes to be levied in the municipal district for municipal purposes. the grounds on which and the extent to which remissions may be granted etc. Rule 178 in Chapter IX of the Rules framed by the Kurla Municipality under clause (i) of section 46 provides that the municipality shall levy the under-mentioned taxes in accordance with the rules and subject to the exemptions in the appendice respectively noted against them:

1 House & Property Tax .....Appendix A

2 Conservancy Cess .....Appendix B

Clause 2 in Appendix B provides for the levy of the annual conservancy ~~xxxxxxxxxxxxxx~~ cess of Rs.4 per cent. on the assessed annual rental on all the three classes of property specified in clause 1. Under rule 170 the Municipality may make remissions to any extent on the recommendation of the Controlling Committee in cases in which the controlling committee is satisfied that the recovery of the amount proposed for remission would entail hardship on a poor man and in cases

falling under section 69(2) of the Act. Rule 180 provides that remission under section 69(2)(a) and (b) shall not ordinarily be granted for vacancies of less than 3 months and shall not extend to more than 3the or less than 1/6th of the annual rate or cess or the instalment of cess on the house or tenement. Section 69(3) corresponds to section 86(2) of the Bombay Municipal Boroughs Act. The Municipality has all along been granting remission under rule 180 in the case of the general conservancy cess. The Examiner, Local Fund Accounts, had held that the grant of such remission is irregular and unlawful onthe ground that though the general sanitary cess is imposed in the form of a rate on buildings under the municipal Rules it is not a rate on building within the meaning of section 59(b) (i) or the Bombay District Municipal Act (section 73(i) of the Bombay Municipal Boroughs Act) and under section 69 refund or remission on the ground of vacancy is admissible in the case of a rate on buildings or lands imposed under section 59(b)(i) of the Act or in the case of a special sanitary cess only and remission in the case of general sanitary cess is not covered by the provision of the Act and is, therefore, contrary to law. The question for the consideration of the R.L.A. is whether the remissions granted by the municipality under rule 180 in the case of the general sanitary cess are lawful.

3. In 1937 a question was raised by the Accountant General as to whether the arrears of general sanitary cess due to Kurla Municipality could be recovered from the transferee of a property as arrears of house tax and in his opinion No.4175 dated the 17th August 1937 the R.L.A. held: "Section 73 of the Bombay Municipal Boroughs Act, 1925, provides for imposition of taxes described in clauses (i) to (xv) thereunder. Clause (i) provides x for levy of a rate on buildings or lands or both situate within the municipal borough. Clause (viii) provides for levy of a general sanitary cess while

clause (x) provides for a general water rate or a special water rate or both. Although water tax can be levied in the form of a rate assessed on buildings and lands a general sanitary cess cannot be so levied for clause (viii) does not provide for it as is done by clause (x). Consequently a general sanitary cess levied under clause ~~this~~ (viii) is not a rate on buildings and/ lands. However, it would be otherwise when levied as a consolidated tax under the proviso (c) to section 73. But it appears that Kurla Municipality is not levying a consolidated tax (see rule 2 in Appendix B to Kurla Municipal Rules and By-laws). The presumption made by the Accountant General that the general sanitary cess is levied as a rate on buildings and lands in the Kurla Municipality is not correct. Consequently the general sanitary cess levied by the Kurla Municipality under clause (viii) of section 73 is not a rate on buildings and lands. A transferee of buildings and lands would not, therefore, be liable under section 112 to pay arrears of general sanitary cess due from the transferor for the period prior to the date of transfer"

4 It is doubtful if the reasoning in the above opinion is quite sound. While it is correct to say that the general sanitary cess is not a rate on buildings, that does not appear to be conclusive. A valid distinction can be made between a rate or tax on buildings and a rate or tax assessed as a rate on buildings. In the case of a tax on buildings the taxpayer's liability arises merely from his ownership or possession of a house. In the case of a general sanitary cess the liability arises from the fact of the Municipality's providing certain sanitary services. The method of assessing or calculating the amount of the tax is in the case of a house tax always on the rental or capital value of the house. In the case of the general sanitary cess several methods are possible e.g. a flat rate or again a rate assessed on the rental or capital

value of the house. Now under section 58(1) of the Bombay Municipal Boroughs Act the Municipality has been given power to prescribe "..... the mode in which taxes or rates shall be levied .....". Prima facie it would thus appear to be within the power of the Municipality to levy the general sanitary cess as a rate assessed on buildings. It was sought in the above opinion to limit the general power of the Municipality to choose its own method of levying that tax. That opinion proceeded on the ground that in the case of a water rate the Municipality is specifically given power to levy it in the form of a rate assessed on buildings, while in the case of a general sanitary cess there is no specific empowering. But in the case of the water-tax there appears special reasons for specifically giving the power. A water tax is by way of a payment for a commodity and not payment for a service. Assessing it as a rate on buildings is not the most obvious method of assessment and it may have been thought necessary to mention that method specifically. Further in clause (x) which deals with the water-rate the method of assessment as a rate on buildings is mentioned in conjunction with the words "or in any other form". The intention in mentioning that method of assessment appears to be not to give the municipality a power of assessment which it would otherwise not have, but merely to make provision for the variety of assessment that the water rate seems to require. There appears to be no valid ground in the wording of section 73 to confine the method of assessing a tax as a rate on buildings, only to clauses (i) and (x) of that section. I think the Kurla Municipality has power to levy the general sanitary cess as a rate assessed on buildings. The method of levy prescribed in their rules for levy of that tax appears to me both legal and eminently convenient.

B.K.S. 1/5.

5. If it is held that the general sanitary cess can be assessed as a rate on buildings, the next question that arises is whether section 86 of the Municipal Boroughs Act provides for remission in the present case. That section provides that remission will be granted in certain circumstances in the case of <u>any building or land which is assessed to a rate</u> based on the annual letting value and payable by the year. The question is whether the words underlined refer only to the house tax provided for in clause (1) of section 73 or also to any other tax assessed as a rate on houses. The wording is by no means clear and the answer to the question cannot be certain. But if the words were confined to house tax it would mean that an empty house could not under section 86 obtain remission of the water rate. Further under section 73 the general sanitary cess may be consolidated with the house tax property so called. It appears that the consolidated tax may be remitted under section 86. It would seem anomalous if the general sanitary cess could while consolidated be remitted but could not, while unconsolidated. There seems no good reason why in this matter so much should depend on consolidation. I am, therefore, inclined to think that the general sanitary cess if assessed as a rate on buildings or land, can be remitted under section 86 of the Municipal Boroughs Act (section 69 of the District Municipal Act) and the present remissions fall within the scope of Rule 179 of the Kurla Municipality Rules."

Sd/- P.N.M. 4/2
Remembrancer of Legal Affairs.

U.R. to G.D. No. 877, dated the 4th February 1943.

Submitted with reference to C.D. office note dated 26-2-1943.

The Kurla Municipality resolved to obtain R.L.A's opinion on payment of fees. As suggested in the office note dated 5-12-42, a fee of Rs. 30/- may be charged to the Municipality for the opinion.

Sd/- K.P.Khangara
O/3/

S.A.G. R.T.K. O/3/

A.L.R. Td/ K.S.S. O/3/

Office of the R.L.A.

A fee of Rs.30/- may be charged to the Municipality for the opinion.

Sd/-R.T.K.
For Remembrancer of Legal Affairs.

U.R. to C.D., No. 1748, dated the 10th March 1943.
File with previous papers (opinion No.877 dated 4-2-43) in C. Drought/43.

Td/ 11/3/

D.K.S. 1/6.

A(Below copy of the Remembrancer of Legal Affairs' opinion No.677, dated the 6th February 1943

No.3133/33-A
General Department,
Bombay Castle, 17th March 1943.

Forwarded to the Commissioner, Northern Division with reference to his memorandum No. M. U. N. D. S. 131, dated the 28th October 1942.

2. A fee of Rs.80 should be charged to the Murla Municipality and credited to Government.

Sd/- C.C.Desai,

Junior Assistant Secretary to the Government of Bombay, General Department.

U.M.S: 1/0.

No.2132/33-A

General Department,
Bombay Castle, 17th March 1940.

Copy forwarded for information to -

the Remembrancer of Legal Affairs.

the Accountant General, Bombay.

By order of the Governor of Bombay,

Sd/- C.G.Desai,

Junior Assistant Secretary to the Government of Bombay, General Dept.

D.K.S. 1/5.

Submitted.

2 It appears that the Ahmedabad Muny. diverted about 60 sq. yds of public street land for the purpose of meat-shop with the sanction of the Commr. N.D. The Commr. then raised the question whether Govt. should not levy assessment in respect of land used for the proposed market. The R.L.A. who was consulted advised Govt. in his opinion No.3653 dt. 12-4-40 that it would be competent for Govt. to levy non-agrl. asst. on such land. The R.L.A. held in that opinion that the lands vesting in a Muny. for munl. purposes under a statute would not be relieved of the liability to land revenue merely because they vest in the Corporation. The Collr. accordingly levied n.a. asst. in respect of the market site The Muny. contests the right of Govt. to levy asst. and gave a notice of a suit to the Govt. on the 10th July 1942. In the meanwhile the Ahmedabad Muny. was supersaded and the Administrator has taken a view that since the municipal property vest in Govt. the Govt. should revise the orders levying n.a. asst. He also forwards a copy of High Court judgment in C.A. No.59 of 1940 in which the view is taken that property vesting in a muny. for the public purpose continues to belong to the Muny. even though it is used for some other public purpose and that it does not revert to Govt. The Collr. of Ahmedabad and the Commr. both do not agree with the Administrator's proposal and recommend that the orders cannot be accepted and has shown the papers to the R.L.A. before the reply is issued.

3. It may be pointed out that the threatened suit has actually been filed by the Mu. (C.S.No.907) and the report from the Collr. has been received in this office. The brief has been prepared by the P.A. On

B.K.S. 1/5.

In brief the R.L.A. has raised certain points and the case is now marked for Mr. Bhangare. These papers may be returned to R.D. through G.D. with the following reply: "Seen and passed on to G.D.")

"The Ahmedabad Muny. has already filed a C.S.No.907 of 1942 against Govt. in the Court of the F.C.Sub-Judge, Ahmedabad, in respect of the levy of non-agrl. assessment on the market site, and the report from the Collr. of Ahmedabad under r.118 of the L.C.Rs. has been received in R.L.A's office. The question whether the orders issued in G.R.R.D.,No.2640-VII, dated 18-6-40 are affected by the High Court judgment in C.A. No.59 of 1940 is being considered in the suit papers."

Sd/- K.J.Pathare.
18/3/

S.A.S. Reply may be as proposed by Mr. Pathare and papers may be seen and passed on to G.D.

R.T.K.

A.L.R.

Id/-R.S.H. 26/3/

R.L.A. Id/-P.N.M. 31/3/

U.R. to G.D.No.2446 dt. 2-4-43-

Office of the R.L.A.

Under General Department Notification No.1825, dated 5th October 1942 issued under rule 38B(2)(b) of the Defence of India Rules, Mr. Whitwirth has been appointed to exercise and perform all the powers and duties on behalf of the Ahmedabad Municipality with effect from 7th September 1942. As observed by Weston J. in Criminal Appeal No.10 of 1943 though Mr.Whitworth was appointed as Administrator with retrospective effect, that is itself would not validate any action of his if taken against the employees between 7th September 1942 and 5th October 1942. In the present case, however, the order of dismissal was passed by Mr.xWhitworth not before 5th October 1942 but after that date, on 24th November 1942, and consequently the order passed by him would be legal and valid it being made after his appointment as the Administrator of Ahmedabad Municipality.

Sd/-P.M.M. 7/4
Remembrancer of Legal Affairs.

U.R. to G.D. No. 161-Confl., dated the 8th April 1943.

B.K.S. 1/5.

What was done in the present case by Government Resolution, General Department No.1481, dated 10th July 1939 was to sanction the revised scale of pay of the post of Chief Officer. Rule 277 of the Ahmedabad Municipal Rules deals with the matter of initial pay and subsequent promotions. A change in the scale of pay is not included in the subject matter of this rule. This is clear from the fact that the rule was made, as appears from Volume I of the Ahmedabad Municipal Code, under clause (e) of section 46 of the Bombay District Municipal Act, 1901, which clause gives power to make rules "determining the mode and conditions of appointing, punishing or dismissing any officer or servant" etc. It is clause (b)(ii) of section 46 of the 1901 Act which gives the power to make rules determining the salary of the Municipal officers. The corresponding provision of the 1925 Act is contained in clause (c) of section 58. It may be that the application of a revised scale of pay in so far as it reduce the pay of the holder of the post, is a matter outside clause (c) of section 58. But on the other hand it does not fall within the subject matter of "initial pay and subsequent promotions". So far therefore as Mr. Bhagat's claim is based on rule 277 of the Ahmedabad Municipal Rules, it does not appear to be well-founded.

Sd/-P.N.M. 2/3
Remembrancer of Legal Affairs.

U.R. to G.D., No.111-Confl., dated 3rd March 1943.

B.K.S. 2/5.

With reference to R.L.A.'s No.111-Confl. dated 3rd March 1943, the further question is asked whether the Ahmedabad Municipality is competent to revise the scale of pay of the post of Chief Officer so as to reduce the pay of the holder thereof. There is no section of the Bombay Municipal Boroughs Act, 1925, or rule thereunder which forbids such application, but such application may amount to a reduction under section 33(2) of the Act, and for such reduction a resolution passed by the votes of at least two-thirds of the whole number of councillors is required. Speaking generally, the Municipality is competent to make the application in question. But the question remains whether in this case the method of applying the new scale was free from legal objection.

2. The first point is whether the application of the new scale amounted to a reduction under section 33(2) of the Act. That section provides that :

"(2) No Chief Officer shall be removed from office, reduced or suspended unless by the votes of at least two-thirds of the whole number of councillors; and no such officers shall be punishable with fine."

If there was no reduction under that section then of course there would be no objection to the application of the new scale so far as that section was concerned. But in one case at least the R.L.A has held that such application does amount to a reduction. (U.R. to G.D., No.O.Munic.Cities 32/29 dated 9th November 1929). In that case the R.L.A. opined that a reduction in the scale of pay of the Chief Officer accompanied by the deprivation of certain additional powers and duties appertaining to him as Engineer amounted to a reduction of the Chief Officer. There is also another case in which the question was whether an emergency cut imposed by the Satara Municipality was a reduction under section 33(2) of the Act. The Municipality took the view that that section dealt only with reductions by way of punishment. The question was referred to the Advocate General who expressed the view that "the section applies whenever the pay of the Chief Officer is reduced whatever be the reason of the reduction". (See Advocate General's opinion No.65 of 1934). The above two cases are not on all fours with the present reference, but it would be safe to hold that they are good authority for the view that in the pres

case the Chief Officer was reduced within the meaning of section 33(2).

3. The next question then is whether in this case there has been sufficient compliance with the provisions of that section. The section requires that there should be a resolution passed by the votes of two-thirds of the whole body of councillors. The President in his letter No.479, dated 8th May 1939 at page 55 of G.D. file No.1481-II of 1936 says that of the 51 councillors present none voted against the resolution. It is not quite clear whether all these councillors voted for the resolution. But at this date it may be presumed that the votes of more than two-thirds of the whole body of councillors were in favour of the new scale. The only difficulty arises from the fact that the resolution in question, namely G.B.Resolution No. 2138 of 1938-39 must serve both as the amendment of the rule required by section 58 of the Act and as the resolution required by section 33(2). My opinion is that the resolution could so serve but it is unnecessary to enlarge upon this question. The important point seems to be that the Municipality was legally competent to change the scale of pay and apply the new scale to the incumbent's post. It may be that it was inequitable in the present case to reduce the ~~[illegible]~~ Chief Officer's pay. But it is presumably no part of Government's concern to buttress any equitable claims the Chief Officer may have, with technical objections that the method followed by the Municipality in changing the scale and applying it, was not legally perfect. It is doubtful if such objections would yield any relief in a civil court. Further this particular method of reducing or increasing the Chief Officer's pay has been long practised by the Municipality and acquiesced in by both Government and the Chief Officer.

sd/-P.N.M. 17/3
Remembrancer of Legal Affairs.

U.R. to G.D. No.2018, dated the 13th March 1943.

B.K.S. 2/5.

(3) Papers regarding above matters as they would be readily be sent to the Municipality every month. Necessary information and books, charts, maps and papers as would be required by Mr.Bhagwat be furnished to him. Mr. Bhagwat be empowered to spend with the previous sanction of the Municipality an amount not exceeding Rs.500/- in all, for preparing maps, charts etc.

(4) Discussion with the previous consent of the President as regards matters referred to Mr.Bhagwat, be held with the councillors twice every month. Discussions with Municipal Officials be arranged on days suitable to both the parties.

(5) Mr. Bhagwat will not have the status of a municipal servant and no rules applicable to municipal servants will apply to him. A furnished room be placed at the disposal of Mr.Bhagwat. However there should be no objection if he works at his house at his convenience."

The Examiner, Local Fund Accounts, has taken strong objection to Mr.Bhagwat's appointment as Municipal Adviser and points out that it cannot be justified under section 59(2) of the Municipal Boroughs Act, 1925. The Municipality has attempted to justify the appointment under sections 71(r) and 204(2) of that Act. The only point on which H.L.A's opinion is sought is whether the appointment can be justified under section 71(r).

2. Section 71(r) provides that a municipality may at its discretion provide either wholly out of the municipal property or fund for any measure not specified in section 68 or in the other clauses of section 71, likely to promote public safety, health, convenience or education. By the terms ofthe resolution Mr.Bhagwat is asked to deal immediately with 8 questions. It is not clear whether questions other than these 8 can be referred to him. Of these 8 questions, 6 deal with municipal economy or efficiency viz., (a), (b), (c), (d), (g) and (h). Presumably these are matters likely to improve the Municipality's efficiency. To improve the Municipality's efficiency is indirectly to promote the interests of the public. But the nexus between a municipality's efficiency on the one hand and the public safety, health, convenience or education ~~on the~~ one hand would ordinarily be too tenuous to bring any of the above 6 matters within the scope of section 71(r). In very exceptional circumstances it might be possible to justify under clause (r) the appointment of an adviser

Office of the R.L.A.

Before the 11th August 1939 there was a rule of the Poona Municipality that all municipal servants were to be ordinarily retained in service until they reached the age of 60 years. On the 3rd July 1937 the Municipality had passed a resolution that Mr. S.R.Bhagwat, Chief Officer of the Municipality, should be retained in service till his 60th year. On the 1st of November 1938 Mr. Bhagwat proceeded on 28 months leave. In his absence on the 11th of August 1939, the Municipality made a new rule to the effect that all municipal servants should retire on reaching 55 years. According to a proviso to this new rule Mr. Bhagwat was given an extension but finally he was made to retire with effect from 1st March 1941. Mr.Bhagwat petitioned the Municipality to be retained in service and threatened legal proceedings. On his petition the Municipality passed the following resolution on 14th February 1941:-

"Mr.S.R.Bhagwat cannot be allowed to continue in municipal service as per his application dated 11-1-1941 as he retires from 1-3-1941 in accordance with the revised sub-rule No.1 at page 82 of the Rules and Byelaws under which he has been given full concession which cannot be further extended."

However, on the 29th March 1941 the Municipality passed the following resolution regarding Mr.Bhagwat:-

* * ** *

"(2) Mr.Bhagwat, the retiring Chief Officer be appointed as Municipal Adviser for a period of 1-4-1941 to 31-7-1942 on an honourium of Rs.200/- p.m. He be paid Rs.400/- for the month of July 1942. He be paid in all Rs.3400/-

Mr.Bhagwat should deal immediately with the following questions viz:-

(a) What improvements could be effected in the present financial position of the Municipality.
(b) Establishment schedule of Municipal servants and the seniority list.
(c) Matters affecting interests of the lower staff of the Municipality.
(d) Measures to make Municipal staff and employees more efficient.
(e) Measures for educating the citizens in civic rights and responsibilities.
(f) Five or seven year-programme of City Improvement to be financed within the present financial limitations.
(g) Duty list of municipal servants.
(h) Octroi schedule.

on municipal administration. But there is nothing in the papers to suggest that any such exceptional circumstances are present in this case. So far as the above 6 matters are concerned Mr. Bhagwat's appointment cannot it seems be justified under section 71(r).

3. The other two matters referred to Mr. Bhagwat are (e) measures for educating the citizens in civic rights and responsibilities and (f) a 5 or 7 years' programme of City Improvement to be financed within the present financial limitations. The term "eduction" in rule 71(r) is probably wide enough to include education in civic rights and responsibilites. City improvement measures could almost certainly be justified under one or other of the clauses either of section 71 of section 68. Expenditure on measures under either (e) or (f) could therefore be justified. Since that is so, it is reasonable to hold that the appointment of a suitable person to advise on these measure could be justified either under the general clause (r) of section 71 or under some one or other of the particular clauses of section 68 or 71. So far, therefore, as matters (e) and (f) ar concerned, it may be that the appointment is one likely to promote the public safety, health, convenience or education. The question however cannot be definitely answered without a fuller enquiry into the facts. In the circumstances it is tempting to hold that the motive for making the appointment was to compromise the dispute between Mr. Bhagwat and the Municipality. The President's letter dated 22-7-1941 at page 3 of the File, especially from paragraphs 6 onwards, does noth to dispel that suspicion. But however objectionable the motiv it would probably be wise to acquiesce in Mr. Bhagwat's appoin ment, provided his services were to be effectively utilised fo dealing with measures (e) or (f). But it is difficult to believe that Mr. Bhagwat's appointment fulfils that condition. It would be pertinent to inquire what are the fruits of Mr. Bhagwat's labours and how he divides his time between the vari matters referred to him. In brief, my opinion is that the app ointment cannot be justified under section 71(r) of the Municipal Boroughs Act unless Mr. Bhagwat's services have been effectively utilised for dealing with measures (e) or (f).

It is for the General Department to discover whether his services have been so utilised.

Sd/-P.E.M. 9/2
Remembrancer of Legal Affairs.

U.R. to G.D. No.998, dated the 9th February 1943.

B.K.S. 2/5.

Office of the R.L.A.

It appears that the Bhusawal Municipality has incurred an expenditure of Rs.8,000/- in constructing gutters on private plots. The questions for the consideration of the R.L.A. are:-

(1) Whether the expenditure incurred by the Municipality on gutters on private lands is legal if not,

(2) Whether the same can be recovered from the plot owners

2. Under section 66 of the Bombay Municipal Boroughs Act, 1925 the municipal fund and all property vested in a Municipality shall be applied for purposes of this Act within the limits of the municipal borough. Clause (i) of section 68(1) inter alia provides that it shall be the duty of every Municipality to make reasonable and adequate provision for constructing, altering and maintaining public drains, sewers, drainage-works and ~~xx~~ sewerage works, while section 71(k) provides that a Municipality may at its discretion provide either wholly or partly out of the municipal property and fund for supplying, constructing and maintaining in accordance with the general system approved by a sanitary board, receptacles, filling pipes and other appliances whatsoever on or for the use of private premises and conducting the sewerage ~~xx~~ thereof into sewers under the control of the Municipality. Section 135(1) provides for powers of a Municipality to require owners to keep drains etc. in proper order unless constructed at the cost of the Municipality. These provisions give ample powers to the Municipality to ensure an efficient drainage and sewage system and make it clear that the Municipality can construct works on private land in connection with the system. On the other hand it is clear from the provisions of sections 129 and 130 of the Act that the owners of houses are normally expected to construct the individual house drains and the Municipality has compulsory powers in that respect. It is not known whether the owners of the new houses in question complied with the provisions of section 130. Nor is it known whether the gutters in question are individual house drains or common drains running along

private streets. In the latter case it would appear to be within the Municipality's power to construct drains at its own expense. It is true that section 115 permits the Municipality to drain such a street at the expense of the owner. But if the Municipality chooses to do it at its own expense, the Municipality's action cannot be said to be illegal nor could the Municipality at this stage recover the expenses from the persons concerned. The Municipality's action might be open to objection on the ground that it favoured one set of ratepayers at the expense of another but that is not a matter in this case for this office to consider. Without knowing more of the history and site of those gutters the R.L.A. cannot usefully say more.

3. A fee of Rs.80/- may be charged for the opinion.

Sd/- P.N.M.
Remembrancer of Legal Affairs.

U.R. to G.D., No.3080, dated the 27th April 1943.

B.K.S./2/5.

To

The Commissioner,
Central Division.

Subject:- Bhusawal Municipality.

Expenditure incurred on construction of gutters on pk plots owned by private persons.

No. S.227/5932-A, Bombay Castle, 6th May 1943.

Reference your letter No. Bhusawal 1/1-II, dated the 28th January 1943.

2. A copy of the Remembrancer of Legal Affairs' opinion No. 3080, dated the 27th April 1943, is forwarded herewith. Please communicate the substance of the opinion to the Bhusawal Municipality.

3. A fee of Rs.80/- should be recovered from the Municipality for the opinion and credited to Government under the head "XLVI-Miscellaneous -Collection of payments for services rendered". The date of the payment should be reported to the Legal Department and to this Department as required by Government Circular No. 8947, dated the 4th February 1932.

C. G. Desai,

For Under Secretary to the Government of Bombay,
General Department.

No.....

No. S.227/5932-A,
General Department,
Bombay Castle, 6th May 1943.

Copy forwarded to the Secretary to Government, Legal Department, for information.

By order of the Governor of Bombay,

Id/- C.G.Desai.
For Under Secretary to the Government of Bombay,
General Department.

B.K.S. 2/5.

At the triennial election of the Nasik Borough Municipality held on 23-11-1942 one Mr. Daulatrao Chimaji Sonavane was declared duly elected. As required by Sec.17 of the Bombay Municipal Boroughs Act, the names of the elected councillors were published in the Bombay Government Gazette by the Collector of Nasik under Notification No. M.U.No.271 dated 5-12-42 (pp.246-247 of B.G.G. of 1942, Pt. IA). The first meeting of the newly constituted Board was fixe fixed for 20-12-1942, but Mr. Sonavane died on 4-12-42, before any such general meeting could be held. The President, Nasik Borough Municipality, sent in proposals for holding a bye-election. On 17-12.1942, one Mr. P.M.Murkute, however, applied to the Collector of Nasik, requesting that he may be declared elected vice late Mr. Sonavane, he being the person who obtained the next largest number of votes in Non-Muhammadan Ward No.II. The Collector of Nasik is of opinion that under sec.25(2) of the Bombay Municipal Boroughs Act, 1925, the term of office of the councillors commences from the date of the first general meeting, but that as in the case under consideration Mr. Sonavane died before the commencement of the term of office of the newly constituted Board, it is for consideration whether the next highest candidate in the Ward can be declared duly elected on the ground that no vacancy has occurred as the deceased was not in fact a councillor. He further considers that the case does not seem to be covered by sec .29 of the Bombay Municipal Boroughs Act. 1925. The Commissioner, C.D., concurs with the view of the Collector of Nasik that the case is not covered by the provisions of sec.29 of the Act. He is, however, of opinion that a bye-election must be held and that the voters must be given their right to elect. The R.L.A. is requested to advice whether the view expressed by the Commissioner, C.D. , is correct.

2. On the above facts, the questions for the consideration of the R.L.A. are these :-

(1) Whether, as suggested by the President, Nasik Borough Municipality, a bye-election can be held under sec. 29 of the Bombay Municipal Boroughs Act, 1925, for filling up the vacancy; or

(2) Whether Mr. Murkute, the candidate who obtained the next largest number of votes in Non-Muhommadan Ward II, can be declared to be elected as requested by him.

3. Section 29 of the Bombay Municipal Boroughs Act, 1925, provides that where a vacancy occurs through the non-acceptance of office by a person elected or appointed to be a councillor, or through such person being disqualified for becoming a councillor, or through any election being set aside under the provisions of sub-section (2) of section 15, or through the death, resignation, removal or disability of a councillor previous to the expiry of his term of office, the vacancy shall be filled up, as soon as it conveniently may be, by the election of a person thereto, who shall hold office so long only as the councillor in whose place he is elected would have held it if the vacancy had not occurred. The question is whether the present case falls within the purview of the words "the death of a councillor previous to the expiry of his term of office". It might at first sight appear that the words "expiry of his term of office" contemplate that the term of office must have begun. But if that had been the meaning of the Legislature to express that it would have been easy to express that meaning by the words "during his term of office". So far as the words in question are concerned, I think they can reasonably be interpreted as meaning any time previous to the expiry of his term of office and include the period between his election and the beginning of his term of office.

4. The next point is whether a person who has been elected but whose term of office has not begun is a councillor for the purposes of section 29. Sub-section (1) of section 25 provides that the councillors nominated or elected at a general election shall, save as otherwise provided in the Act, hold office for a term of three years. Sub-section (2) of section 25 provides

that the term of office of such councillors shall be deemed to commence from the date of the first general meeting which shall be held after the election and after the expiry of the term of the outgoing councillors. It further provides that the term of the outgoing councillors shall be deemed to extend to and expire with the day before the date of such meeting. It follows from these provisions that for a short space of time there are in two sets of councillors viz:-

(1) the newly elected councillors who do not assume office till the date of the first general meeting, and

(2) the outgoing or retiring councillors who, although their term of three years has expired, still remain in office till the day before the first general meeting of the newly constituted Municipality.

Councillor" has been defined in section 3(4) as a person legally a member of the Municipality. Having regard to the provisions of section 14,15,17 and 19A of the Act the expression " councillor" can reasonably be interpreted for the purposes of sec. 29 to include a person legally elected as a councillor even if he has not taken office or the newly constituted Municipality has not commenced to function. If the councillor dies before he takes office his death must be deemed to have caused a casual vacancy within the meaning of section 29.

5. Regarding the second question there appears to be no provision of the Act whereby Mr. Murkute can be declared to be elected. But in view of the answer to the first question, the second need not be considered.

Sd/-P.N.K.
Remembrancer of Legal Affairs.

U.R. to O.D., No. 3579 dated 15th May 1945.
B.K.S. 9/5.

The President, Nasik Municipality states that the present import of grain into Nasik City is inadequate and consequently difficulties are experienced by the public in obtaining food supplies. With a view to securing adequate supply of food stuffs, some of the public spirited citizens of Nasik are prepared to advance to the Municipality a sum of Rs.40,000/- without interest subject to the following conditions:-

(1) That license be granted by Government to municipality to purchase food grains for the public of Nasik from the District or from other place and import it to Nasik; and

(2) That the municipality should undertake to make necessary purchases.

As the Nasik Municipality was not financially in a position to spare from its fund large amounts for purchase of food grains, and as the proposed advance of Rs.40,000/- to the municipality was without interest the President approached the Collector of Nasik for "immediate permission for the loan". The Collector informed the President, Nasik Municipality, that there was no objection to the municipality taking advances upto Rs.40,000/- without interest, but that it should be on the condition that no liability for the loss would rest on the municipality. He suggested that the transaction should be considered as a contract under the provisions of section 48 of the Bombay Municipal Boroughs Act, 1925. The Commissioner, Nasik Division C.D., however, doubts whether the Collector's recommendation to treat the transaction as a contract under section 48 of the Act is correct. On the above facts,

the question for the R.L.A's consideration is whether the transaction can be treated as a contract under section 48 of the Bombay Municipal Boroughs Act, 1925.

The question whether the loan "should be considered as a contract" hardly goes to the root of the matter. In the first place either there is a contract or there is not a contract. If there is a contract it must comply with the provisions of section 48 of the Bombay Municipal Boroughs Act, 1925; otherwise it would be invalid. Section 48 does not empower a Municipality to borrow money. For the present matter, section 48 is relevant only so far as it prescribes the manner in which contracts are to be executed. It is not clear what is meant by "considering or treating the transaction as a contract". Whether or not the Municipality proposes to enter into a contract in this case is not clear from the papers. Neither are the details of the Municipality's scheme nor the terms on which the money was accepted fully stated. The real questions in this case appear to be:

(1) whether the transaction amounts a borrowing by the Municipality;

(2) whether in view of section 7 of the Local Authorities Loan Act, 1914, the Municipality has any authority to borrow under the Bombay Municipal Boroughs Act; and

(3) whether the Municipality is competent to borrow money for the present purpose.

As regards the last question, the R.L.A. has expressed the opinion in U.R. to G.D.No. 4727 dated 9th June 1942 that a Municipality is competent under the Bombay District Municipal Act or under the Bombay Municipal Boroughs Act to incur expenditure for the opening of cheap

grain shops. The limits of a Municipality's power in that respect are sufficiently indicated in that opinion. But the present purpose of the Municipality is not clear. As regards the other two questions, since the loan is interest free and there is perhaps a paramount need to provide cheap grain in one way or another, Government might, after obtaining a fuller knowledge of the facts, grant sanction without further consideration of the Municipality's power to borrow. The only party which seems to be running a risk is the creditor and if he is willing to enter into the transaction Government need not raise any objection. The legality of the present transaction does not primarily depend on whether or not there is a contract. If the borrowing is beyond the Municipality's powers, the execution of a contract would not materially change the situation. In fact, section 7 of the Local Authorities Loans Act specifically provides that a contract made for the purpose of borrowing money otherwise than under the Local Authorities Loans Act shall be void. Provided that the amount of Rs.40,000 is expressly excluded from the Municipal Fund and the Municipal Fund is expressly exempted from any charge in respect of that amount, it might be permissible to regard the Municipality as the donor's agent for the operation of a scheme to provide cheap grain and the question of borrowing would not arise. The amount might be made a charge on the grain purchased and be repaid in instalments. That way of regarding the matter would raise the question whether the Municipality can act as an agent in order to fulfil its obligatory or discretionary function. It seems unwise

to ~~xxxxxxx~~ pronounce definitely on that very big question at this stage. It seems wiser to sanction this case as a special case if sanctioned it is to be. But it seems desirable in the first instance for Government to know the exact terms on the loan and the details of the Municipality's scheme to utilise it.

Sd/- F.N.M. 8/6
Remembrancer of Legal Affairs.

U.R. to F.D. (Supply) No.4156, dated 10-6-1945

B.K.S. 2/6.

Office of the R.L.A.

The view taken by the Examiner, Local Fund Accounts, in paragraph 1 of his letter dated 29th September 1942 is correct. It is obviously des...ble for the Municipalities to give sufficient time to the receivers of special notices to lodge objections before the date fixed in the public notice. This can be done either by serving the special notices at the same time or soon after public notice is given or else by giving a sufficiently long date in the public notice. One month is the minimum period prescribed.

Sd/-P.N.S. 22/6
Remembrancer of Legal Affairs.

U.O. to C.D., No.4418, dated the 24th June 1943.

B.K.S. 2/5.

Office of the R.L.A.

It appears that the Ahmedabad Municipality following the municipal rules for the levy of notice fee and warrant fee in respect of municipal taxes levies similar fees in respect of the Urban Immoveable Property Tax.

2. Under section 24(1)(a) and (2)(b), of the Bombay Finance Act, 1932 Part VI, the collection of the Urban Immoveable Property Tax is to be made by the appropriate municipality, in the same manner in which the property tax is collected in that area, that is to say under sections 104 and 105 of the Bombay Municipal Boroughs Act, 1925. The procedure as laid down in those sections in short is that, when the amount becomes due, the Chief Officer causes to be presented to any person liable for the payment thereof, a bill for the sum as due If the sum is not paid within the time allowed for payment then a notice of demand in the form of Schedule V of the Act is served upon the person. If in spite of this, the person does not pay then the sum with all costs of the recovery is levied under a warrant signed by the chief officer by distress and sale of moveable property and attachment and sale of immoveable property. Under section 108, fees for notice and warrant issued, and maintenance of any live-stock xx seized are charged at the rates ...pectively specified in this behalf in the rules of the municipality and are to be included in the costs of recovery to be levied under section 105. Section 24A of the Bombay Finance Act Part VI provides for the recovery by way of penalty of a sum not exceeding one fourth of the amount unpaid.

3. The questions raised for the consideration of the R.L.A. are :-

1) whether the levy of notice and warrant fees in case of default of payment of the Urban Immoveable Property tax after presentation of the bill for demand of the tax is legal under section 105(1) of the Bombay Municipal Boroughs Act, 1925, read with section 24(2) of the Bombay Finance Act, 1932;

2) if so, whether such fees should be credited to Government or to the Municipality.

Sub-section (2) of section 24 of the Bombay Finance Act, 1932, provides that the collection of the Urban Immoveable Property Tax shall be made in the same manner in which the property tax is collected in the said area. Section 24A(1) prescribes a penalty in default of payment of the Urban Immoveable Property Tax after service of notice of demand in the manner provided in section 24(2). Sections 104 and 105 of the Bombay Municipal Boroughs Act prescribe the procedure for the collection of the property tax. Further section 105(1) also provides for the levy of all cost of the recovery under a warrant if the person on whom notice of demand has been served under section 104(3) does not pay. The levy of notice and warrant fees is a right specifically made available to the municipality and is on a strict view not part of the procedure prescribed for the collection of the property tax. Further, section 24A(1) of the Bombay Finance Act prescribes a penalty in default of payment of the Urban Immoveable Property Tax after service of notice and under section 25 the Municipality is entitled to rebate for cost of collection. That indicates that the Municipality is not to recover the notice and warrant fees under section 105 of the Municipal Boroughs Act. The reply to the first question would therefore, seem to be in the negative. If this view is correct the second question will not survive.

4. As the question is of importance and is not free from doubt the Advocate General is requested to favour the R.L.A. with his opinion.

Sd/-P.N.MODS.
Remembrancer of Legal Affairs.

U.R. to Advocate General No.4784, dated the 9th July 1943.

B.K.S. 2/5.

No.15 of 1943.

ADVOCATE GENERAL'S CHAMBERS,
HIGH COURT,
Bombay, 15th July 1943.

Re: U. R. No. 4784
To The Advocate General -
dated 9th July 1943.

OPINION.

The question to be considered are whether the ---Ahmedabad Municipality is entitled to levy notice and warrant fees in recovering the Urban Immoveable Property Tax, when there is a default on the part of the person liableto pay the same, and if so, whether such fees, when recovered, should be credited to Government or to the Municipality. Section 104 of the Bombay Municipal Boroughs Act, 1925 lays down the procedure to be followed, when any amount is, under the provisions of that Act, declared to be recoverable in the manner provided by Chapter 8 of that Act. Section 105 lays down that where a notice under - Section 105 has been given and the person concerned does not either pay the same or show satisfactory cause, etc., such sum with all costs of the recovery may be levied - under a warrant. Section 108 provides for the framing of rules by the Municipality for fixing the fees and costs chargeable. Such rules have been framed.

The Bombay Finance Act, 1932 provides that the collection of the Urban Immoveable Property Tax shall be made in the same manner, in which the property tax is collected in the said area. It will be noticed that the words used are the same as those which occur in Sub-section 1 (a) of Section 104 of the Bombay Municipal Boroughs Act, 1925. Section 105 expressly refers to Section 104 and the consequences mentioned therein follow on non-compliance with the notice of --- demand. The sum with all costs of recovery may be levied under a warrant signed by the Chief Officer. Section 108 fixes by framing the necessary rules what costs are to be charged for such recovery.

I am of opinion that by reason of Section 24 (2) of the

Bombay Finance Act, Sections 104, 105 and 108 come into operation in recovering the Urban Immoveable Property Tax. The recovery of the costs is incidental to the recovery of the tax itself. Chapter 8 of the Bombay Municipal Boroughs Act is headed "Recovery of Municipal Claims". Although the levy of notice and warrant fees cannot be ----- said to be a part of the procedure prescribed for the collection of the property tax, I do not think, Sections 104 and 105 of the Bombay Municipal Boroughs Act are to be so read as to exclude the recovery of these fees. The fact that the Bombay Finance Act prescribes a penalty in default of payment of the Urban Immoveable Property Tax and that -- under Section 25 the Municipality is entitled to rebate for costs of collection does not in my opinion affect the question. The payment of the penalty is not meant to be in substitution of the right to recover the costs from the person liable, if he makes default. Nor does the fact that as between Government and the Municipality provision is made for giving rebate to the Municipality for costs of collection, entitle the person in default to be relieved from the payment of the costs of recovery. I am of -- opinion that the levy of notice and warrant fees as laid down in Sections 104, 105 and 108 of the Bombay Municipal Boroughs Act is proper and legal.

The next question to be considered is to whom such notice and warrant fees are to be credited when recovered. This question is a little doubtful. But on the whole I am of opinion that these fees should be credited to Govern.-ment. Section 25 of the Finance Act is, I think, a sufficient indication that the only amount which the Municipality are entitled to receive as the cost of -- collection is the rebate provided for by Section 25. It must I think be taken that it was contemplated when the provision in Section 25 was made that in some cases the

persons liable would make default in payment and costs would have to be incurred by the Municipality by issuing notices and warrants and by recovering the - amount in the manner prescribed under Sections 104 and 105. No provision is made by the Finance Act for payment to the Municipality of any sum by way of costs of collection except the rebate mentioned therein. I am, therefore, of opinion that these fees when collected should be credited to Government.

Advocate General.
13 July 1943.

B.K.B. 3/5.

AT
45

Office of the R.L.A.

The Advocate General was consulted in this case. A copy of his opinion No.15 of 1943 dated 13th July 1943 is sent herewith.

Sd/- P. N. M. 21/7
Remembrancer of Legal Affairs

U.R . to H. D. No. 5039 dated the 23rd July 1943.

H.A.G. 3/3.

Office of the R.L.A.

Mr. ? M. T. Modi, an elected ~~Exmmt~~ Councillor of the Surat Municipality, cannot be held to have incurred disqualif cation by reason of his enforced absence on account of detention under the Defence ofIndia Rule 26. The Collector's order declaring his seat vacant can doubtless be set aside by Government under section 28(2) of the Bombay Municipal Boroughs Act, 1925; but unfortunately the by-election has been held and the candidate declared elected has already taken office. In the circumstance it appears advisable to follow the general rule that a person defacto in possession of office is presumed to be rightly in office until the contrary is established by due course of law (see Halsbury's Laws of England, Vol.VIII, p.34; R.L.A's opinions No.9697, dated ..-11-1941 and No.79 dated 6-1-1942. Government may therefore refer Mr. M.T. Modi to the Civil Court to have his grievance, if any, redressed

Sd/- P N M. 9/8
Remembrancer of Legal Affairs.

U.R. to G.D., No.61.).Confl. dated the 9th August 1943.

B.K.S. 3/5.

stated in section 61 (1). However unmaking or altering of a bye-law ~~xx~~ is in a way making a bye-law. The reason underlying the publication of a proposed bye-law is that whenever there is going to be a change in the existing circumstances the public should get an opportunity to put forth their views as to the essentiality or otherwise of the proposed change. The same reasoning would apply in cases in which a bye-law is altered or amended because it involves the change in the status quo and it is desirable that the public should get an opportunity of criticising the change otherwise it is submitted that the very object of clause (2) of section 61 will be nullified merely with the help of the strict letter of law. Note under the heading "alter or recind" on p.164 of Cunning's Dist. Municipal Manual quotes section 21 of the General Clauses Act which states that powers to issue by-laws includes a power exercisable in the like manner and subject to the like sanction and conditions, (if any) to add to vary or rescind any by-law so issued. Cunning's note relates to section 48 (i) of Dist. Municipal Act which is similar to section 61 (i) of the Act and appears to have no bearing at all on sub-section (2) of section 61. But the logic behind section 31 of the General Clauses Act can perhaps be well utilised in interpreting sub-section (2) of section 61 of the Act. The conclusion therefore is that a publication of a proposed recission if a bye-law is neceseary and the prasumption raised by G.D. in that respect is correct.

6. However the position is different in the instant case. The Bye-law in the present case was declared ultra vires by the Government. It was therefore a nullity. Although the rescission of it may involve a change the public cannot be heard in opposition of the deletion. The publication in such cases is therefore not necessary.

Id/- C.D.D. 2/8 I agree. Reply may be:-
S.A.S. Since clause (iii) of by-law No.50 of the Broach Municipal Rules and By-laws is ultra vires, no publication of the draft of its recision would be necessary.

R.L.... Id/P.M.M. 9/8 R.T.K. 2/8

U.R. to G.D.No.5492 dt.12th August 1943.

B.K.S. 3/5.

Submitted.

2. By-law No.50 of the Broach Municipality is drawn on the lines of By-law No.43 of the Orr's Model Bye-laws under section 48(i)(b) of the District Municipal Act, 1901. A copy of that bye-law is at p-1 in the file By G.R. G.D. No.91 dated 8th Feb. 1943 (Slip R), Government published for the information of the various local bodies that clause (iii) of Orr's Model Bye-law No.43 ultra vires the provisions of the Bom. Dist. Municipal Act, 1901, and hence it should be deleted. Section 48(i)(b) of the District Municipal Act, 1901 corresponds to section 61(i)(b) of the Municipal Boroughs Act, 1925 and for that reason such a by-law would be ultra vires the other act also.

3. Municipality of Broach is governed by the Municipal Boroughs Act, 1925. On 15th May 1943 the General Board passed a resolution in harmony with G.R.G.D. No.91 dated 8th February 1942 deleting clause (iii) of bye-law No.50. This resolution was not published for public criticism before the passing of it. On these facts the question for the consideration of the R.L.A. is whether the publication of a proposed recision is necessary especially in view of the fact that the bye-law was ultra-vires.

4. Section 61(i) of the M.B.Act, 1925 provides that a Municipality may from time to time with the previous sanction of the Provincial Government makes alter or recind bye-laws not inconsistent with this Act. Section 61(2) provides that a municipality shall, before making any by-law under this section, publish in such manner as shall in its opinion be sufficient, for the information of the persons likely to be affected thereby, a draft of the proposed by-law, together with a notice specifying a date on or after which the draft will be taken into consideration; and shall, before making the by-law, receive and consider any objection or suggestion with respect to the draft which may be made in writing by any person before the date so specified.

5. Section 61(2) confines itself to a making of bye-law of not of receiving or altering a bye-law as is clearly

stated in section 61 (1). However unmaking or altering of a bye-law xx is in a way making a bye-law. The reason underlying the publication of a proposed bye-law is that whenever there is going to be a change in the existing circumstances the public should get an opportunity to put forth their views as to the essentiality or otherwise of the proposed change. The same reasoning would apply in cases in which a bye-law. is altered or amended because it involves the change in the status quo and it is desirable that the public should get an opportunity of criticising the change otherwise it is submitted that the very object of clause (2) of section 61 will be nullified merely with the help of the strict letter of law. Note under the heading "alter or recind" on p.164 of Canning's Dist. Municipal Manual quotes section 21 of the General Clauses Act which states that powers to issue by-laws includes a power exercisable in the like manner and subject to the like sanction and conditions, (if any) to add to vary or rescind any by-law so issued. Cunning's note relates to section 48 (i) of Dist. Municipal Act which is similar to section 61 (i) of the Act and appears to have no bearing at all on sub-section (2) of section 61. But the logic behind section 31 of the General Clauses Act can perhaps be well utilised in interpreting sub-section (2) of section 61 of the Act. The conclusion therefore is that a publication of a proposed recission if a bye-law is necessary and the presumption raised by G.D. in that respect is correct.

6. However the position is different in the instant case. The Bye-law in the present case was declared ultra vires by the Government. It was therefore a nullity. Although the rescission of it may involve a change the public cannot be heard in opposition of the deletion. The publication in such cases is therefore not necessary.

Id/- C.D.D. 2/8 I agree. Reply may be:-
S.A.S. Since clause (iii) of by-law No.50 of the Broach Municipal Rules and By-laws is ultra vires, no publication of the draft of its recision would be necessary.

R.L.A. Id/P.N.M. 9/8 R.T.K. 2/8

U.R. to G.D.No.5492 dt.12th August 1943.

B.K.S. 3/5.

51 SB 51

Office of the R.L.A.

The question for the consideration of the R.L.A. is whether such Canteen Stores as are not consumed within the octroi limits but are exported for sale are exempt from the levy of octroi under rule 4(2)(c) of the Octroi Rules of the Poona City Municipality.

2. Under rule 4(2)(c) of the Poona City Municipality Octroi Rules and By-laws goods which (not being articles imported by Government agency for sale) are the property of a public authority and are accompanied at the time of import with an invoice endorsed with the certificate etc. are exempt from the levy of octroi duty. The Canteen Stores imported by Government for sale to troops would not be exempt from the octroi duty under the present rules. But Government would be entitled to refund of octroi subject to a deduction of 10% (Rule 18) on export for sale of such of these stores as are not consumed within the octroi limits of the Poona City provided that they have been exported within twelve months next after the date of their import, a claim is made not later than seven days next after the export thereof (see rul 11(2)(ii) and (iii) of the Rules) and a transport pass is obtained showing that they were included in the stores specified in the import bill (see rule 14(b)(ii) of the Rules).

Sd/-P.N.M. 27/8
Remembrancer of Legal Affairs.

U.R. to G.D., No.5837, dated the 28th August 1943.

B.K.S. 3/5.

[illegible]

[illegible]

The question raised for the consideration of the R.L.A. is whether or not an old motor car belonging to a person forms part of his kit and as such is not liable to octroi duty when brought within the limits of a municipality along with his other kit.

2. Under clause (iv) of section 59 of the Bombay District Municipal Act, 1901, and section 73 of the Bombay Municipal Boroughs Act, 1925, a municipality can levy octroi on animals or goods or both brought within the octroi limits for consumption or use therein. Both the Acts provide for making rules prescribing the tax and specifying the classes of persons or of property or both which the municipality proposes to make liable and any exemptions which it proposes to make. Consequently whether or not an old car brought by a person would be liable to octroi duty would depend upon the rules made by the municipality within whose limits the old car is brought. No other municipality appears to levy octroi duty on old cars. Rather than consider the same general question raised by G.D., it seems more to the point to consider whether the tax is justifiable under item 62A of the Sholapur octroi schedule. That item was amended with effect from 18-3-1942 by the addition of the words "if packed". The rule was amended on the suggestion of the Collector who had apparently moved on the application of Dr. K.S.Raje who had imported a car by rail. The Collector suggested that the item was intended only to tax those cars which were imported by dealers for sale. It is not clear whether the Municipality accepted this suggestion but at any rate the item was amended without dispute. If the item is now meant to cover only cars imported by dealers for sale it does not seem very effective since it would not cover the case of such cars driven into the town by road, a common method of import by dealers. On the other hand it is quite anomalous that cars imported by rail should be taxed while cars imported by road and driven should be exempt. "If packed' may mean 'if crated' That seems

a more natural meaning than 'if loaded on a vehicle or wagon' On the other hand I do not know whether crated cars are ever sent to Sholapur. I think the amendment of the item was meant to exempt a car imported in circumstances like the present. If that is so, the octroi duty ought not to have been charged or ought to have been refunded. If the amendment had not that purpose - the wording is not at all clear -, then it may be considered whether the Municipality should be asked to amend further. If it is not how possible to obtain refund the present two cases may be treated as special cases without raising general questions for the purpose of deciding whether the two officers or Government should bear the expense of the octroi duty.

Sd/- F. N. M. 6/9
Remembrancer of Legal Affairs.

U.R. to G.D., No.5993, dated 7th September 1943.

B.K.S. 3/5.

Submitted.

In exercise of the powers conferred by sec.25-A of the Bombay District Police Act, 1890, the District Magistrate, Ahmedabad, issued an order on 14th/20th November 1941 calling upon the Ahmedabad Municipality to assess and recover the amount of Rs.17,38,822 on account of compensation for the loss or damage arising due to riot. The Ahmedabad Municipality, however, refused to collect the riot tax. On the basis of the opinions of the R.L.A. and the Advocate General, Government in its letter No.4583/4-IIID dated 14-5-1942 informed the Commissioner, N.D. that it decided to proceed against the Ahmedabad Municipality under sec. 218 of the Bombay Municipal Boroughs Act, 1925, and accordingly to serve the Municipality with a six months' notice. An order of Government dated 14th May 1942 asking the Commissioner, N.D. to fix a period within which the Municipality should perform its duty was therefore sent to him along with a draft notice. For the reasons stated in para. 2 of letter from the Commissioner, N.D. No.P.O.L. 1257 dated 4th November 1942. (Confl.), the D.M.Ahmedabad issued a revised requisition to the Ahmedabad Municipality on 4th May 1942, requiring the Municipality to recover the amount of Rs.18,94,745/- instead of Rs.17,38,822. It appears that pending receipt of the Municipality's reply to the revised requisition, action on H.D. letter No. 4843/4-III-D dated 14-5-1942 was held in abeyance, as it was necessary to arrange for a modification of the number and date of D.M, 's order and of the amount of compensation ~~xxxxxxxx~~ mentioned in ~~x~~ Order No.4583-4-III of 14th May 1942 issued by Government under section 218 of the Bombay Municipal Boroughs Act, 1925, issued to the Commissioner, N.D. and also in the draft notice. It is presumed that in pursuance of the order of Government issued under section 218(1) of the Bombay Municipal Boroughs Act, 1925, the Commissioner, N.D. issued a notice on the Ahmedabad Municipality under section 218(1) of the Act fixing a period of six months for the perfor-

mance of the duty.

2. In his letter No.P.O.L.1257(Confl) dated 29th July 1943, the Commissioner, N.D. proposes that "as there is an Administrator in charge of the Ahmedabad Municipality, the course previously recommended of taking action under sec. 218 of the Bombay Municipal Boroughs Act, and approved by Government (vide letter No.4583/4-III-D dated 14-5-42) may be dropped and the recovery may be made by the Administrator under section 25A of the Bombay District Police Act, 1890". Since he is not sure of the legal position, he requests that R.L.A. should be consulted. The question for R.L.A.'s consideration is whether there is any objection to reverting to the procedure of recovery under the Bombay District Police Act after initiating action under sec.218 of the Bombay Municipal Act, 1925.

3. As pointed out by the Advocate General in his opinion dated 4th April 1942, the position is that for every default in respect of a duty imposed on a municipality by any enactment for the time being in force, Government will have two alternative remedies. The first would be the remedy, if any, provided by the Act imposing the duty. The second would be the remedy provided by section 218 of the Bombay Municipal Boroughs Act, 1925. There is nothing in the terms of section 26(1) of the Bombay District Police Act, 1890, which has the effect of restricting the action that Government might take in the case of default to the action mentioned in the proviso to that section. It appears equally competent for the Provincial Government, at its option, to take action either under the proviso to section 26(1) of the Bombay District Police Act, 1925, in case of default of the Municipality to recover the riot tax. Government cannot, however, take action under both the said sections simultaneously. In this case, Govt. has already issued an order under section 218(1) of the Bombay Municipal Boroughs Act directing the Commissioner, N.D. to fix a period for the recovery of the amount of riot tax and accordingly the Commissioner appears to have fixed that period. It may, however, be stated such an order is merely an administrative

order and it can be amended, varied or cancelled by Government under sec. 218(1) of the Bombay Municipal Boroughs Act, 1925, read with section 21 of the Bombay General Clauses Act, 1904 (See Bagchand vs. Secretary of State, I.L.R. 48 Bom.87 Confirmed in 51 Bom.725(P.C.) Since now it is proposed that the Administrator should recover the riot tax under sec.254(1)(c) of the Bombay District Police Act, 1890, and no coercive proceedings should be resorted to, Government may first cancel its order issued to the Commr., B.D. under sec.218(1) of the Bombay Municipal Boroughs Act, 1925. It would then be open to the Administrator, in the ordinary course, to comply with the revised order of the D.M. Ahmedabad dated 4th May 1942 and to recover the riot tax, in pursuance of such order.

Id/- B. P. Bhangara
25/8/

Office of the R.L.A.

The notice issued by the Commissioner, N.D., under section 218(1) of the Bombay Municipal Boroughs Act, 1925, is intended to enforce compliance with the order of the D.M., Ahmedabad, under section 29A(1)(c) of the Bombay District Police Act, 1890. If the Administrator of the Ahmedabad Municipality is willing to carry out the order of the D.M., there is no necessity for taking any further action under section 218(2) of the Bombay Municipal Boroughs Act. Reversion to the procedure prescribed under section 29A of the Bombay District Police Act, 1890, is in the circumstances free from legal objection.

Sd/- P. N. M. 9/9
Remembrancer of Legal Affairs.

U.R. to H.D., No.6098, dated the 11th September 1943.

B.K.S. 3/5.

Office of the R.L.A.

In his letter No.L.2/1705 dated 27th July 1943, the Examiner Local Fund Accounts, Bombay, observes that "This proviso (proviso to section 209(2) of the Bombay Municipal Boroughs Act, 1925) is capable of being interpreted in two ways: One interp[illegible]s that the limit of Rs.5000/- referred to therein, upto which the Standing Committee can sanction reappropriations from one minor or sub-head to another, refers to the amount of reappropriations made at any one time or on each occasion. The other interpretation is that this limit of Rs.500 is the aggregate limit of the total reappropriations that may be sanctioned by the Committee in the whole year." The Examiner considers that if the former view were accepted, the powers of the Standing Committee would be almost unlimited, as in that case it would be open to the Standing Committee or any other Committee to sanction reappropriations any number of times, from one sub-head or minor head to any other sub-head or minor head, not exceeding Rs.500/- at any one time. This would obviously frustrate the object of imposing a momentary restriction on the powers of the Standing Committee inasmuch as it would give a free scope to the Standing Committee to change the budget sanctioned by the General Board according to its own views and discretion, provided that the changes made each time under each head did not exceed the limit of Rs.500/- In the absence of any words such as "at any one time" or "on each occasion" after the words and figures "Rupees 500/-" occurring in the proviso to section 209(2), the correct interpretation in the Examiner's opinion would be that the limit of Rs.500/- should apply to the total reappropriations sanctioned by the Standing Committee in the whole year and not on each occasion.

The language of the proviso to section 209(2) of the Bombay Municipal Boroughs Act, 1925 is somewhat ambiguous. Of the two interpretations suggested by the Examiner, one would appear to give too much liberty to the Standing Committee to be tenable.

B.K.S. 3/5.

The interpretation favoured by the Examiner is more rational and consistent with the scheme of the Act.

Sd/-P.B.N. 20/9
Remembrancer of Legal Affairs.

U.R. to G.D., No.6354, dated the 21st September 1943.

B.I.S. 3/5.

ffice of the R.L.A.

Since the Nasik Municipality resolved on 8th May 1942 to abandon the proposed Wheel and Toll tax on bicycles under clause (c) of section 75 of the Bombay Municipal Boroughs Act, 1925; and the proposal is now revived after a considerably lapse of time, it will have to observe the whole procedure again as provided in clauses (a) and (b) of that section if it desires to impose the Wheel and Toll tax on bicycles.

Sd/- P.M.M. 20/9
Remembrancer of Legal Affairs.

U.R. to G.D., No.6355, dated the 21st September 1943.

B.K.S. 3/5.

Sub-rule (2) of rule 10 of O. 1 C.P.C. provides for the addition of (1) necessary parties and (2) of proper parties. Necessary parties are parties "who ought to have been joined" that is, parties necessary to the constitution of the suit without whom no decree at all can be passed. Proper parties are those whose presence enables the Court to adjudicate more "effectually and compeltely". A person may be added as a defendant to a suit though no relief may be claimed against him, provided his presence is necessary for a complete and final decision of the questions involved in the suit (see Mulla's C.P.C. pp.518-519). In Durga Charan Sarkar V. Jotindra Mohan Tagore (27. Cal493 at p.497) it was held that in order that a party may be considered a necessary party defendant two conditions must be satisfied, first, that there must be a right to same relief against him in respect of the matter involved in the suit; and second, that his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit where any act of Govt. is questioned or the proprietary or right to revenue of Govt. is likely to be affected Govt. is a necessary party to the suit (Chitaley's C.P.C. Vol. 2 at p.1312.)

Where a local authority is superseded, be it under section 179, of the Bom. M.D.Act, 1901 or under section 129 of the Bom. Local Boards Act, 1923 or under section 219 of the Bom. Municipal Boroughs Act, 1925 or under rule 38B of the Defence of India Rules, the local authority itself is left intact, "the management of its affairs being provided for by the appointment of a person or persons to be chosen by Govt. and the property itself is vested in Govt. only in trust for the purposes of the local authority concerned. And the constitution of such a Council is but the revival of the old corporation and not the creation of a fresh one and all the rights and liabilities of the superseded Council will devolve on the council so reconstituted as its rightful successor" (See 29 Mad.539; Aiyangar's Municipal Corporations in British India p.18). During

the period of supersession all the powers and duties of the superseded local authority are to be exercised and performed by the person or persons appointed and consequently all suits will have to be instituted or defended by the person or persons so nominated and the expenses of such litigation should be met out of the funds at his or their disposal (See R.L.A's opinion No.2215 dated 21-11-1922). It is true that during the period of supersession the property of the superseded local authority vests in Govt.; but Govt. holds it in trust. Although the property vests in Govt. it would be deemed to be at the disposal of the person or persons appointed since such person or persons would be clothed with all the rights and liabilities of the sup erseded local authority.

The question whether Govt. would be a necessary or a proper party would be one of fact and thatwould depend upon the facts of each case. As pointed out above where ~~x~~ any act of Govt. is questioned or the proprietary right or right to revenue of Govt. is likely to be affected, Govt. is a necessary party to the suit. In some cases Govt. may have such an interest in the matter that the joinder though not absolutely necessary might be considered to be proper. Where Govt. has no interest of any kind in the suit, it is neither a necessary nor a proper ~~party~~ party (see Chitaley's C.P.C. Vol. II p. 1313). The more fact that the property of the local authority vests in Govt. during the period of its supersession would not be a sufficient ground to hold that Govt. is a necessary or a proper party, for any decree passed against the person or persons appointed during the supersession would be binding on the local authority and consequently effective against the property vesting in Govt. (I have not been able to trace any case on the point).

R.T.K./
18/3

A/L.R. I agree with S.A.S.

Id/- R.S.H. 20/3

R.L.A.

I am inclined to agree with this view. There are a number of suits pending in A'bad and other Districts where

the question whether Govt. is a necessary or proper party is in issue. Some courts have held that Govt. is a necessary party while others have taken a contrary view. The point is whether it is expedient from the administrative view for Govt. to contend that it is not a necessary party. In defending the suits we have all along taken the stand that Govt. is not a necessary party. We should I think maintain this position until there is an authoratative decision of the High Court to the contrary.

Id/- P.N.M.
28/3/

B.K.S. 3/5.

R.I.No.5222
26-4-43.

Submitted.

2. This is a reference made by R.D. relating to the recent decision of the Bombay High Court in 44 Bom. L.R.354. The Commissioner, N.D. has forwarded two cases from the Ahmedabad and Surat Districts, respectively, requesting orders on the point whether he should revise orders of the Collectors directing the public wells to be resumed as they ceased to be used for the purpose x for which they were vested in the Municipality and reverted to Govt. It appears that in the case of the Sanand Municipality (Ahmedabad) the land measuring 99 sq. 4 ft. out of S.No.6A/1 of the tank was resumed on the orders of the Assistant Collector, Dholka Prant, dated 21-6-1941 and in the case of the Surat Municipality, the well in S.No. 2094 of ward No.9 measuring 789 yds. was resumed under the order of the City Survey Officer, Surat, dated 14-5-1941. In the former case proposal to levy assessment and fine for unauthorised occupation was called for, while in the latter it was disposed of under rule 43-B of the Land Rev.Rules. In view of High Court decision referred to above, the municipalities now claim back the lands in question and the Collectors request that the orders of resumption should b set aside. The question raised for consideration of the R.L.A. is whether there is any period of limitation within which the municipalities should prefer their claims in such case.

B.K.S. 3/5/ 4c.

Office of the R.L.A.

A copy of the R-L.A's opinion No.6941 dated the the 18th October 1943 given to G.D. is forwarded herewith to the R.D. with a copy of the Advocate General's opinion No.25, dated the 27th September 1943.

Sd/-P.M.M. 16/10
Remembrancer of Legal Affairs.

U.R. to R.D. No. 6942, dated the 18th October 1943.

B.K.S. 3/5. 4c.

L.D. R.I.No.9623
5-10-43

Submitted.

The Commissioner C.D. has forwarded to Government for sanctioning (a) the draft building by-laws (p.13) and (b) Prevention of Ribbon Development by-laws (p.17) framed by the Bhusaval Municipality. As regards (b), he has suggested revised by-laws in para. 3 of his endorsement dated 9th April 1943 for adoption by the Municipality. (vide p.1 ante). These by-laws are framed under clause (v) of section 61(1) of Bombay Municipal Boroughs Act, 1925 but G.D. considers that they can more appropriately be framed under clause (u) rather than under clause (v) of that section. The question for the consideration of the R.L.A. is whether these by-laws can be framed under clause (u) of section 61(1) ofthe B.M.B. Act, 1925.

"Seen and returned.

The view expressed in para 4 of the G.D. office note of 4-10-43 at p.35 is correct."

Id/- E.P.B.
14/10

A.L.R. R.T.K. 15/10

R.L.A. I concur. By-laws relating to prevention of ribbon development would more appropriately fall under cl. (u).

Reply as suggested.

Id/- P.N.M.
2/10/

U.R. to G.D.No. 7090 dt. 23rd October 1943.

B.K.S. 3/5/ 4c.

Office of the R.L.A.

This reference arise from the request of the President of Municipal Borough, Bijapur, to postpone the triennial election to be held in March 1944 and to extend the term of the Municipality by one year up to 31st March 1945 as the preparation of a new election roll would entail considerable expense. This request was negatived by Government and the Commissioner, Southern Division was directed to advise the Municipality to proceed with the preliminaries for holding the election and further that if the Municipality wished to avoid unnecessary expenditure in preparing a new election roll it should hold elections on the basis of the election roll for the time being in operation. The President has again approached Government expressing his apprehension that the elections held on the basis of the election roll now in operation migh be successfully challenged on the ground of failure to comply with the rules prescribing the procedure for preparation of the voters' list etc.

2. The questions referred to the Remembrancer of Legal Affairs for consideration are:-

(1) Whether the proviso to sub-section (1) of section 13 of the Bombay Municipal Boroughs Act, 1925, overrides the provisions of section 11(2)(a) of the Act; and

(2) In case a new election roll is not published in time as required by the Election Rules, whether the Municipality would be legally competent to hold the general election on the basis of the election roll now in operation.

3. Section 10 of the Bombay Municipal Boroughs Act 1925 imposes upon the Provincial Government the duty inter alia to make rules, consistent with the Act, providing for the preparation and revision of the lists of voters from time to time and prescribing the date for the publication of the Municipal Election Roll. Section 11(2)(a) entitles a person who fulfils certain conditions to have his name entered in the voters list or electoral roll. Section 11(2)provides that the electrol roll of tax payers for the time being in force shall be conclusive evidence for the purpose of determining whether any person is

entitled to vote under the provisions of this sub-section at any election. If an electoral roll is not revised in accordance with the rules made under section 10(1)(c) the roll shall continue in force until such revision has taken place. Section 13 enacts that when in accordance with the rules framed under section 10(1)(c) a list of voters has been prepared or, upon a general revision, completed a copy of thereof signed by such person as may be designated in this behalf in the rules aforesaid, shall be the Municipal Election Roll. A new election roll shall be published in each year on such date as may be prescribed by the rules, and shall continue in operation for a period of twelve months from that date: Provided that if a new election roll is not published in any year before the date prescribed the roll then in operation shall continue in operation until the new roll is published. Rule 5 of the Bijapur Municipal Election Rules framed by Government under section 10 of the Act requires the preparation of a list of voters not less than 4 months prior to the date on which the term of office of the Municipal Councillors expires and on the corresponding date in each subsequent year. Rule 11 provides that when the list of voters has been prepared, and where necessary, revised in accordance with any order passed in that behalf by the appellate authority or by the Judge in Second Appeal a copy thereof signed by the Returning Officer shall be the Municipal Election Roll which shall be published in the manner prescribed in rule 6 not later than 45 days from the date on which the list of voters was published under the rule.

4. There is no question of the proviso to section 13(1) overriding the provisions of section 11(2)(a). These provisions when read together are reconcilable. It is clear that annual preparation of the voters' list and election roll is an obligatory duty which cannot justifiably be dispensed with on the ground of expense. It might not however be possible on account of unavoidable delay to complete and publish the new election roll within the prescribed time and therefore a special provision is

made in the Act that in the event of the new election roll then in operation shall continue in operation until the new roll is published. Under this provision it would be competent for the Municipality to hold fresh elections on the basis of the old election roll, if in the meantime it is not possible to complete and publish the new election roll. But, as I have already observed, it would not be proper for the persons charged with the task of preparing the voters' list and new election roll to fail in their statutory duty merely on the ground of expense.

Sd/- P. N. M. 24/11
Remembrancer of Legal Affairs.

U.R. to G.D., No. 8703, dated the 24th November 1943.

B.K.S. 3/5/ 4c.

Statement of the Case for opinion of the Advocate General.

City Survey No.2438 of Jamalpur Ward No.1 of Ahmedabad which contained a public well vested in the Ahmedabad Borough Municipality under section 63 of the Bombay Municipal Boroughs Act, 1925. The land was shown in the old City Survey papers as of Government ownership, but in the revision survey papers it was shown as vesting, in the Municipality for public and non-profitable purpose. It was discovered in 1934 that the well had been filled up, and a formal inquiry having been made under section 37(2) of the Bombay Land Revenue Code, 1879, the City Survey Officer declared that the land in question belonged to Government. After unsuccessfully appealing against this order, the Ahmedabad Municipality filed a suit, No.286 of 1936, against the Government for a declaration of its title to the suit land and consequential reliefs. The matter went up to the High Court in Second Appeal No.59 of 1940 and it was held by a Division Bench consisting of the Chief Justice and Wadia J. that the effect of section 63 was that the land in suit belonged absolutely to the Municipality (Ahmedabad Municipality vs. Government of Bombay 44 Bom. L.R. 354). In the course of the judgment the learned Chief Justice observed: "The scheme of the Act is that property used for a public purpose as specified in section 63 x is to vest in the Municipality; and if it has ceased to be used for the public purpose the Municipality can sell it, with the consent of the Commissioner under section 48 and the proceeds shall form part of the municipal fund under section 65; but I can find nothing in the Act which suggests that Government have any interest in the matter."

B.K.S. 3/5/ 4c.

2. The ruling being contrary to the view consistently taken by the Law Officers of the Government and being one which would affect Government's rights of considerable value, the Advocate General was requested by this office U.R. No.4100 dated the 18th May 1942 to express his opinion whether legislation should be undertaken to nullify the effect of the ruling or whether it was desirable to await a suitable opportunity to obtain an authoritative decision of the Privy Council on the point. The Advocate General (Mr. M.C.Setalvad) in his opinion dated 8th June 1942 expressed the view that legislation should be undertaken and added that the view taken by the High Court appeared to him, having regard to the scheme and provisions of the Act a sound one. The matter however is of vital importance to Government and since as it appears neither the High Court nor Mr. Setalvad were cognisant of the several relevant considerations and authorities bearing on the subject, it is necessary to reexamine the position in greater detail.

3. Although the judgment of the Chief Justice expresses the view that all the property specified in section 63 of the Bombay Municipal Boroughs Act, 1925, would belong absolutely to the Municipality, the actual decision was with respect to only one of the kinds of property specified in that section, namely, publi wells, Now it is well established that a decision is an authority only for what it actually decides. And in Queen v. Leatham, 1901, A.C.495 Lord Halsbury said: "Every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found there are not intended to be the expositions which may be found there are not intended to be the expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found." The

6. It is true that their Lordships did not refer to the presence of the words "belong to" in the section. Nor do the words appear to have been referred to in the course of the argument. But it is impossible to assume that Counsel and Judges both omitted to notice their presence in that section. It would therefore appear that the words were treated as being not relevant in relation to a public street formed upon land which originally belonged to others. In others words the Privy Council seems to have taken the view that the section must be read distributively and constructed reddendo singule singulis; that is that the words "belong to" must be read as referring to those classes and items of property which lawfully belong to the Municipality and the words "vest in" as relating to those classes and items of property which would vest in the Municipality in the accepted ~~x~~ sense of the term. Except upon this assumption it is impossible to understand the omission of the Privy Council to consider the effect of the words "belong to" in the section. For instances where an enactment has been read distributively, see Dwarris on Statute Law, p.613; Muhammed Enaz vs. Birji Lal, I.L.R. 1 All.465 P.C. at page 471; Canada National Fire Insurance Co. vs. Hutchings 1918 A.C.451, at p.457.

7. The view that section 63 of the Bombay Municipal Boroughs Act must likewise be read distributively is supported on the following considerations. In the first place the word "vest" had already been judicially construed to have a well defined and restricted meaning in such context and according to the established rules of construction the words appearing in same context must necessarily be given the same meaning: See observations of James L.J. in Greave vs. Tofield (1880) 14 Ch.D.563 at p.571: and of Lord Halsbury in Webb vs. Outrim (1907) B.K.S. 4/5/ 40.

decision therefore will not necessarily apply to other kinds of property mentioned in section 63 and it would be open to Government to negotiate the matter in respect of such other property.

4. The argument in favour of the view stated by the Chief Justice namely that the property referred to in section 63 belongs absolutely to the Municipality, may be briefly stated thus: (1) the wording of section 63 is that the property shall "vest in and belong to" the Municipality. (2) Section 114 deals with a disused street and provides that land used formerly as street and no longer required for such purpose can be sold under section 48.

5. In dealing with the first branch of this argument it may be pointed out that the Privy Council recently construed section 116 of the U.P. District Municipalities Act. which is an enactment in pari materis and also uses the words "vest in and belong to", as merely abridging the rights of the original owner of the land which is included in public streets and not as altogether destroying such interests: Maharaja Man Singh of Sewai Jaipur v. Arjun Lal and others (1937) 4 All England Reports at p.5 S.C. I.L.R. 1937 All. 901. Their Lordships cited with obvious approval the following observations of Lord Morris in Municipal Council of Sydney vs. Young, 1898 A.C.457-459: "Now it has been settled by repeated authorities that the vesting of a street or public way vests no property in the municipal authority beyond the surface of the street, and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but that it does not vest the soil or the land in them as the owners". Their Lordships of the Privy Council in Man Singh's case evidently adopted this ruling as correctly representing the effect of a section like section 116 of the U.P. District Municipal Act; and that decision negative the argument that the effect of the section is to transfer the property to the Municipality absolutely

A.C. 81 at p.87. Therefore if the legislature intended to give absolute title to the Municipality in respect of ~~in~~ the property specified in section 63 it would have eschewed the use of this word. Secondly the use of the words "belong to" as the Chief Justice correctly points out indicates absolute title. The appearance of the two words together must therefore necessarily imply that each of them is used in a different sense; See for instance observations of Sir George Rankin in Income-tax Commissioner of Madras Vs. Diwan Bahadur S.L.Mathia, 41 Dom.L.R. 157 at p.166. It is to be also noticed that the use of these two words of varying import is not in relation to the property specified in section 63, because that section obviously refers compendiously to property in relation to which it has varying rights. Some of the classes or items of property referred to are such as would absolutely belong to the Municipality while certain other property which it refers to does not belong to it but can merely vest in it. For instance the Municipality is empowered to construct new roads and when it does so upon land which it has purchased or compulsorily acquired the roads as well as the land belong to the Municipality. But where it has merely taken over roads which run over land which formerly belonged to others, Government or private individuals, to whom no compensation has been paid, the roads would, in accordance with the accepted rules of construction, merely vest in the Municipality for the specified purpose. Thirdly "belong to" in relation to a street would be inapt because "street" has also been judicially construed to mean the surface of the land and so much of the depth as is or can be used fairly for the ordinary purposes of a street. See the Judgment of Brett L.J. in Coverdale v. Charlton 4 Q.B.D. 104 at p.121; Board of Work for the Wordswirth District vs. United Telephone Co., Limited, 1884 13 Q.B.D.904; also S.Sunderam Iyer vs Municipal Commissioner of Madura 25 Mad. 635. It may be added, finally that while the construction of section

63 adopted by the learned Chief Justice denies effet to the words "vest in" which must as is pointed out above, ccstrued in the light of the judicial exposition thereof and reduces those words at best to mere surplusage, the construction now suggested is in accord with the established canons of interpretation; it gives to each word the meaning it must properly bear, and it is consistent with the presumption that the legislature does not intend to take away property without providing compensation to its owners.

8. Turning now to the second branchof the argument, section 114 enables the Municipality inter alia to divert, discontinue or stop up any public street; and subject to the provisions of sub-section (2) of section 48 to lease or sell any land therefore used or acquired by the municipality for the purposes of such streets as may not be required for any public street or for any other purposes of the Act. It is to be observed that this is merely an enabling section, as its opening words "it shall be lawful" indicate. It does not purport to create any new rights. It is addressed to a different purpose altogether. The operation of the principle "once a highway, always a highway" would have prevented the Municipality from stopping up any public street or using for any other purpose or selling any land forming part of the public street notwithstanding that such land, belonged to the Municipality: see Ardesar Jiwanji vs. Aimai Kuverjee, I.L.R. 55 Bom.187, at pages 196 and 197. Section 114 above said is designed merely to cure the disabilities of the Municipality in this respect. It cannot be deemed to confer upon it any rights to property which it did not otherwise possess, and the power of sale given by it must be construed as being limited to such lands in which it has proprietory interest. With reference to a similar provision in the Sydney Corporation Act observed in Municipal Council of Sydney vs. Young 1898 A.C.457, that it must refer to such land

which the Municipality is really entitled and which as a matter of law they can sell like any ordinary individual. It may be observed that the U.P. Act also contains a provision analogous to section 114: See section 219 of that Act. But doubtless owing to the decision in 1898 A.C. 457 no argument was addressed to their Lordships in Mansingh's case op cit based upon that provision. That general words used in statutes are liable to be construed with restrictions and reservations of this nature so as not to alter the general law beyond what is expressed is forcibly brought out in the recent decision of the House of Lords in Bokes v. Doncaster Amalgamated Colliery Limited, 1940 A.C. 1014 where an order of the Court under section 154 of the Companies Act, 1929, transferring all property rights and powers of one company to another upon amalgamation was held not to affect a contract of service could not in law be transferred.

9. It would therefore appear that the arguments upon which reliance was placed by the learned Chief Asst Justice are far from conclusive and would not necessarily hold good in their application to public streets a large portion of the land whereof formerly belonged to the Provincial Government and now vests in the Municipalities. The Advocate General is therefore requested to state whether in his opinion it would be worthwhile reagitating the matter before the Courts in India in a suitable case, and if necessary before the Privy Council.

Sd/- P. E. M.
Remembrancer of Legal Affairs.

U.R. to the Advocate General, No.5467 dated the 12th August 1943.

D.K.S. 4/5/ 4a.

ADVOCATE GENERAL'S CHAMBERS,
HIGH COURT,
Bombay, 27th September 1943.

U. R. to Advocate General No.5487 dated 12th August 1943.

O P I N I O N.

The decision in 44 Bombay L.R. page 354 is a decision on the xx construction of Section 63 of the Bombay Municipal Boroughs Act 1925. In construing that section, reference has been made to other sections of the same Act. The decision explains, what the scheme of the Act is as a whole. It makes no distinction between different kindsof property mentioned in Section 43. Kinds of Property other than public wells have been referred to and dealt with as being on the same footing as public wells. In my opinion it is not possible to xx avoid the application of this decision to questions, which arise under Section 63 in respect of other kinds of property.

The next question is whether in any case, which may arise in future, in respect of property of the kinds -- mentioned in Section 63(ℌ 2) other than public wells, it will be possible to persuade the Court to take a ----- different view. The decision being that of the Appeal Court will be binding on the Court, and I do not think it likely that the Court will be persuaded even to constitute a full bench to reconsider it. The only thing, which could be done under the circumstances, would be to accept the decision of the Appeal Court in such subsequent case and try to take it to the Privy Council.

The most important question, however, is whether the decision in 44 Bombay L.R. page 354 is likely to be reversed by the Privy Council or any other higher Court. The Privy Council decision, in I.L.R. 1937 Allahabad Page 901, does not touch the point in question. In that case neither side contended that the Municipality became the owners of the soil. The appellant contended that

Section 116 of the United Provinces Municipalities Act gave the Municipality only a special property therein sufficient to enable the board to control it as a street. The respondents contended that the section made the Municipal Board owners of the surface of the street and of so much above and below as was necessary for the discharge of their duty and the exercise of their powers under the Act. The street was being used as a street and the question did not arise as to who would be entitled to the soil if the street ceased to be to be used as such. The fact, that the Privy Council did not concern themselves with the question as to whether full title to the soil of the street to the Municipal —— Board, is made clear by the passage in the judgment which says:

> "In the present case the dispute is not with reference to something sufficiently below or above the surface of the street to be beyond the range of its ordinary user as a street."

It is further clear that the decision in that case is —— limited to the question which was then before the Board. The judgment states - page 907;

> "Without in any way holding that Section 116 operates convey title in the full and proper sense, Their Lordships think it at least certain that the original owner of the soil cannot maintain trespass for an erection of the character now in question and they do not think that he can otherwise complain of it as an infringement of his rights as owner."
>
> I do not know whether the United Provinces District Municipal Act contains sections similar to those in the Bombay Municipal Boroughs Act on which our Appeal Court relied in arriving at its decision. It is not safe to rely upon English —— decisions as to what passes to the Municipality or other public body in the case of public streets. We have in the Act Sections, which, as pointed out in the judgment in— 44 Bombay L.R. indicate how property of that nature

is to be dealt with by the Municipality. I am of opinion that it would not be worth while re-agitating the matter before the Courts in India or before the Privy Council.

Advocate General.
27-9-43.

B.K.S. 4/5/ 4c.

Office of the R.L.A.

Formerly the Government of Bombay held the view that it had a reversionary interest in property originally vesting in itself but later transferred to Municipalities for public purpose In accordance with that view Government resumed such property when the Municipality ceased to use it for public purposes and in some cases Government sold it to third parties. However, the Bombay High Court in Appeal No.59 of 1940 has decided that Government has no interest in such property and that on its ceasing to be used for public purposes the Municipality can sell it with the consent of the Commissioner and the proceeds will then form part of the Municipal fund. The position is therefore that Government in the past has resumed possession of propety to which it was not legally entitled. The question for the R.L.A's consideration is when will the Municipality's claim for compensation in respect of such property be time-barred.

2. A suit by the Municipality would presumably take the form of a suit for possession of the property against Government of Government's assignees. The Article of the Indian Limitation Act, 1908, which would apply is Article 142. Under that article the period of limitation is 12 years and the period of limitation would begin from the date of dispossession or discontinuance of possession, that is to say, from the date when Government resumed the lands. It is possible that in particular cases there would be circumstances which would bring into play other Articles of the Limitation Act, but it does not appear that the period in those cases would be circumstances which would bring into play other Articles of the Limitation Act, but it does not appear that the period in those cases would be more than 12 years. As a general rule, therefore, 12 years from the date of Government's resumption may be taken as the period within which a municipality could recover possession or obtain compensation.

B.K.S. 4/5/ 4c.

In the case, however, of street or road land the Article applicable would be 146A. Under that Article the period of limitation would be 30 years and the period would begin from the date of dispossession or discontinuance of possession i.e. from the date of Government resumption.

3. The Advocate General was again requested to state whether in his opinion it would be worthwhile reagitating the matter before the Courts in India in a suitable case, and if necessary before the Privy Council. The Advocate General is not in favour of reagitating the matter. A copy of his opinion is sent herewith.

Sd/- [illegible].M.K. 16/10
Remembrancer of Legal Affairs.

U.R. to G.D. No.6941, dated the 18th October 1943.

Submitted for approval and signature.

Id/-
12/10 Reply in the linked R.D. file 8200/39 is also put up below for signature.

Id/-
13/10

A.L.R. R.R . 13/10

R.L.A.

Submitted after issue.

The papers may be filed in O. Boroughs/43.

B.K.S. 4/5/ 4c.

Office of the R.L.A.

It appears that the Dhulia Municipality proposes to levy a special educational cess of annas four on every bale of cotton full pressed in cotton pressing factories and on every boja (of 392 lbs. or less) of cotton ginned in ginning factories within the municipal limits of Dhulia and make it payable by the owner, manager, agent or wanawatdar of every cotton ginning or pressing factory in Dhulia Municipal limits. The question raised for the consideration of the R.L.A. are:-

(1) whether the levy of the special educational cessin the manner proposed by the Dhulia Municipality is in the nature of an excise duty under entry 45 of List I in Schedule VII to the Government of India Act, 1935; if so,

(2) whether in can be regarded as a tax on trade; if not

(3) how the cess can be levied by the Dhulia Municipality. Clauses (i) to (xiii) of sub-section (1) of section 73 of the Bombay Municipal Boroughs Act, 1925, specify the taxes which can be levied by a municipality. Clause (xiii) provides for the levy of a special educational tax. Clause (xiv) lays down that a municipality may impose any other tax which under the Government of India Act, 1935, the Provincial Legislature has power to impose in the Province. Sub-section (2) provides that nothing in this section shall authorise the imposition of any tax which the Provincial Legislature has no power to levy in the Province under the Government of India Act, 1935. By entry No.45 of List I in Schedule VII to the Government of India Act, the Central Government is allowed to levy duties of excise on tobacco and other goods manufactured or produced in India, whereas under entry No. 40 of List II in Schedule VII a Provincial Government can levy duties of excise on the following goods manufactured or produced in the Province - (a) alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs; (c) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry. Ginned cotton and cotton press-bales are not goods of the

nature falling under entry No.40 of List II in Schedule VII.

"This primary and fundamental meaning of an excise duty in Engl English is that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. That is also its primary and fundamental meaning in India. It continues continues to be an excise duty, no matter at what stage it is collected" (In re C.P. Motor Spirit Taxation Act (Gwyer C .J.) pp.18,19, Federal Law Journal of India Vol. II, 1938-1939). Although the tax proposed to be levied by the Dhulia Municipality on ginned and pressed cotton is called a special / educational tax, it is in reality an excise duty on goods under entry No.45 in List I of Schedule VII to the Government of India Act, 1935. It is true that a municipality is competent to levy taxes on professions, ~~xxxx~~ trades, callings and employments under section 73(1) (xiv) read with entry No.46 in List II of Schedule VII to the Government of India Act; but the cess on ginned cotton and press bales though recoverable from the owner, manager, agent or whiwantdar of every cotton ginning or pressing factory is not a tax on profession, trade, calling or employment. Consequently it would not be competent to levy the cess either as a special educational cess or as a tax on trade. The replies to the first two questions are in the negative.

What form the tax under clause (xiii) of section 73 of the Bombay Municipal Boroughs Act, 1925, should take is for the Municipality to decide on and not for the B.L.A. to advise. The governing condition would / of course be that the tax in any form shall not be such as the Provincial Government has no power to impose.

Sd/-P.N.H. 17/11
Remembrancer of Legal Affairs.

U.R. to C.D., No.8509, dated the 17th November 1943.
B.H.D. 4/3/ 4e.